TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~306.~~ 86

ROBERT DOW, PLAINTIFF IN ERROR,

vs.

DAVID HUMBERT, BARTHOLOMEW SPELLMAN, AND JAMES HEATH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 25, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 306.

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vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Wisconsin, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Robert Dow and David Humbert, Bartholomew Spellman, and James Heath, a manifest error hath happened to the great damage of the said Robert Dow, as by his complaint appears: We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be herein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Nathan Clifford, senior associate and acting Chief Justice of the Supreme Court, this 15th day of September, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] F. M. STEWART,
Clerk of the Circuit Court of the U. S.,
Westn. Dist. of Wisconsin.

2 The return to the within writ appears by the schedule hereto annexed.

The return of the judge of the circuit court of the United States for the western district of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office, in the city of Madison, this 15th day of September, A. D. 1873.

[SEAL.] F. M. STEWART, *Clerk.*

(Indorsed:) Supreme Court of the United States. Wm. Dow vs. David Humbert et al. Writ of error. Filed September 15, 1873. F. M. Stewart.

3 Circuit court of the United States of America for the western district of Wisconsin.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the western district of Wisconsin, begun and held according to law, at the city of Madison, on the first Monday (being the second day) of June, A. D. 1873—present and presiding, the honorable David Davis, associate justice of the Supreme Court of the United States of America, and the honorable James C. Hopkins, district judge—among other the following proceedings were had, to wit:

ROBERT DOW, PLAINTIFF,
vs.
DAVID HUMBERT, BARTHOLOMEW SPELLMAN, and James Heath, defendants. } At law.

Be it remembered that heretofore, to wit, on the 10th day of August,

A. D. 1872, came the above-named plaintiff, by his attorneys, Messrs. Mariner, Smith and Ordway, and filed his præcipe for a summons for money-demand against the above-named defendants as follows, to wit:

Præcipe.

United States circuit court, western district of Wisconsin.

ROBERT DOW
vs.
DAVID HUMBERT, BARTHOLOMEW SPELLMAN, and James Heath. } Action for relief.

F. M. STEWART, *Clerk:*

SIR: Issue summons in above-entitled action according to above directions.

Yours, &c.,

MARINER, SMITH & ORDWAY,
Plaintiff's Attorneys.

AUGUST 10, 1872.

Whereupon a summons issued as follows, to wit:

Summons.

The circuit court of the United States for the western district of Wisconsin.

ROBERT DOW, PLAINTIFF,
vs.
DAVID HUMBERT, BARTHOLOMEW SPELLMAN, and James Heath, defendants. } Summons for relief.

The United States of America to the above-named defendants:

You are hereby summoned and required to answer the complaint of Robert Dow, the plaintiff in this action, which is filed in the office of the clerk of this court, at Madison, in said district, with a copy of which you are also herewith served, and you are also required to file your answer thereto with the clerk of this court, at Madison, and to serve a copy thereof on the attorneys of the plaintiff, whose names are subscribed hereto, at their office No. 110 Wisconsin street, in the city of Milwaukee, within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff will apply to the court for
5 the relief demanded in the said complaint.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, at Madison, in said western district of Wisconsin, this twelfth day of August, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL.] F. M. STEWART, *Clerk.*

MARINER, SMITH AND ORDWAY,
Plaintiff's Attorneys.

Summons returned: "Served on the within-named David Humbert, Bartholomew Spellman, and James Heath, by delivering to them person-

ally a copy of this summons and complaint, this 19th day of August, A. D. 1872.

"F. W. OAKLEY, *Marshal*,
"By JOHN B. TUESDALE, *Deputy*."

And came the said plaintiff, by his attorneys, and filed his bill of complaint as follows, to wit:

Complaint.

The circuit court of the United States, western district of Wisconsin

ROBERT DOW, PLFF.,
vs.
DAVID HUMBERT, BARTHOLOMEW SPELLMAN, and James Heath, defendants.

The said plaintiff, by Mariner, Smith and Ordway, his attorneys, complains of the said defendants, and states that he, the said plaintiff, is a citizen of the State of New Hampshire, and that the said defendants are & each of them is a citizen of the State of Wisconsin.

That said plaintiff, by the consideration of the circuit court of the United States for the district of Wisconsin, on the 27th day of
6 October, 1870, in a certain action in said court pending, wherein said plaintffi, then and still a citizen of the said State of New Hampshire, was plaintiff, and the town of Waldwick, then and still a municipal corporation created by and existing under the laws of the State of Wisconsin, was defendant, recovered judgment against the said town of Waldwick for the sum of seven hundred and eight dollars and ninety cents, which judgment was duly docketed in said court on the day and year last aforesaid, as from the record thereof, now remaining in said court, will more fully appear, which said judgment still remains in full force, not reversed, or paid, or satisfied in whole or in part, nor vacated or appealed from.

That on the 23d day of August, 1871, the said defendants respectively were town supervisors of said town of Waldwick, and then had each of them qualified and entered upon the duties of his said office; and that they, the said defendants, remained such supervisors until the annual town-meeting in the spring of 1872, and during all that time constituted the town board of supervisors of said town.

That on the 23rd day of August, 1871, the said plaintiff caused notice in writing to be personally served upon each of said defendants, directed to the supervisors of the town of Waldwick and notifying them of the rendition of said judgment, also of the date and amount thereof; which notice was in words and figures following, viz:

U. S. circuit court, district of Wisconsin.

ROBERT DOW
vs.
THE TOWN OF WALDWICK. } Judgment dated Oct. 27th, 1870. $708.90.

To the supervisors of the town of Waldwick:

You and each of you will please to take notice that judgment was rendered against said town at the date, for the amount, and in the cause above set forth, that such judgment is wholly unpaid, and that

I demand of you that you order the clerk of said town to put said judgment into the next tax-roll of said town, pursuant to the
7 provisions of chapter 143 of the laws of this State for the year 1871, to be collected.

Yours, &c.,

E. MARINER, *Plff.'s Atty.*

That upon the service of such notice it because the duty of the said defendants, in their official capacity as such supervisors, within sixty days after service of such notice, to have made a proper order requiring the town clerk of said town of Waldwick to put the said judgment in the then next tax-roll of the said town of Waldwick, so that the same might have been collected with and as a part of the annual taxes of said town for the year 1871, that the same might be paid over to said plaintiff in satisfaction of said judgment.

That on the said 23rd day of August, 1871, one William Reevers, jr., was town clerk of said town of Waldwick, duly elected and qualified, and acting, and so continued to be and act, as such town clerk until the annual town-meeting in the spring of 1872.

That at the date of the service of said notice on said defendants, the then next tax-roll of said town of Waldwick was by law required *by law* to be completed by the town clerk of said town and ready for delivery to the town treasurer for collection by the first day of December, 1871; and said town clerk was then by law authorized, in case the defendants had made said order, but not otherwise, to enter, and if the said defendants had made the said order so required, could have entered in said tax-roll of 1871 the amount of the plaintiff's judgment as aforesaid at any and all times after the second Tuesday in November and before the first day of December then next ensuing; all which the said defendants before the said 23rd day of August, 1871, well knew.

And the plaintiff further states that the said defendants, neglecting their said official duty as supervisors of said town, did not, at any time within sixty days after the said 23rd day of August, A. D. 1871,
8 nor at any other time, order the town clerk of said town of Waldwick to put said judgment or the amount thereof in the then next tax-roll of said town, or into any other tax-roll of said town, nor was said judgment or the amount thereof put into said then next tax-roll of said, nor into any other tax-roll of said town by any person; and that after the service of said notice and after full knowledge of said judgment, and on or about the 17th day of November, 1871, they, the said defendants, acting in their said official capacity, levied town taxes the amount of $1,390, for other purposes and State and county taxes, upon the property of said town, but levied no tax in the year 1871 or at any time since to pay said judgment of the plaintiff; that the taxes so levied by said defendants upon the taxable property of said town of Waldwick for the year 1871 were entered by said town clerk upon the tax-roll of said year and collected by the town treasurer of said town.

That the said town of Waldwick is, and in 1871 was, a large and wealthy town; the property thereof liable to assessment for taxation was assessed in said year by the town assessor at over two hundred thousand dollars, and the plaintiff is informed and believes that the actual value of the taxable property of said town is, and in 1871 was, over four hundred thousand dollars, and that had the amount of said judgment been put into said tax-roll for 1871 the same might readily have been collected and paid to the plaintiff; that said town of Waldwick has no property out of which to make said judgment nor any resources for the payment thereof except by taxation.

That the plaintiff has been and still is prevented, by the refusal of the said defendants to make said order for the inserting of his said judgment in said next tax-roll or any other tax-roll of said town, from collecting said judgment, to his damage of eight hundred dollars and upwards.

9 For a second cause of action the plaintiff states that by the consideration of the circuit court of the United States for the western district of Wisconsin he, said plaintiff, on the 10th day of June, 1871, in a certain action in said court pending, wherein said plaintiff, then and still a citizen of the State of New Hampshire, was plaintiff, and the said town of Waldwick was defendant, said town then and still being a municipal corporation, created by and existing under the laws of the State of Wisconsin, recovered judgment against the said town of Waldwick for the sum of fifteen hundred and thirty-one dollars and fifty-six cents, which judgment was duly docketed in said court on the day and year last aforesaid, as from the record thereof now remaining in said court will more fully appear, which said judgment still remains in full force, not reversed, nor paid, or satisfied in whole or in part, nor vacated nor appealed from.

That on the 23rd day of August, 1871, the said defendants respectively were town supervisors of the said town of Waldwick, and then had each of them qualified and entered upon the duties of his said office, and that they, the said defendants, remained such supervisors until the annual town-meeting in the spring of 1872, and during all that time constituted the town board of supervisors of said town.

That on the 23rd day of August, 1871, the plaintiff caused notice in writing to be personally served upon each of said defendants, directed to the supervisors of the town of Waldwick, and notifying them of the rendition of said judgment, also of the date and amount thereof, which notice was in words and figures following, viz:

U. S. circuit court, western district of Wisconsin.

ROBERT DOW
vs.
THE TOWN OF WALDWICK. } Judgment dated June 10th, 1871, for $1,531.56.

To the supervisors of the town of Waldwick:

You and each of you will please to take notice that judgment
10 has been rendered against said town at the date, and for the amount, and in the cause above entitled, and that such judgment is wholly unpaid, and that I demand of you that you order the clerk of said town to put said judgment in the next tax-roll of said town, pursuant to the provisions of chapter 143 of the laws of 1871, of this State, to be collected.

Yours, &c.,

E. MARINER,
Plff.'s Atty.

That upon the service of such notice it became the duty of the said defendants, in their official capacity as such supervisors, within sixty days after service of such notice, to have made a proper order requiring the town clerk of the said town of Waldwick to put the said judgment in the then next tax-roll of the said town of Waldwick, so that the same might have been collected with and as a part of the annual taxes of

said town for the year 1871, that the same might be paid over to said plaintiff in satisfaction of said judgment.

That on said 23rd day of August, 1871, one William Reevers, jr., was town clerk of said town of Waldwick, duly elected and qualified, and acting, and so continued to be and act as such town clerk until the annual town-meeting in the spring of 1872.

That at the date of the service of said notice on said defendants the then next tax-roll of said town of Waldwick was by law required to be completed by the town clerk of said town of Waldwick and ready for delivery to the town treasurer for collection by the first day of December, 1871, and said town clerk was then by law *was* authorized in case the defendants had made said order, but not otherwise, to enter, and, if the said defendants had made the order so required, could have entered in said tax-roll of 1871 the amount of the plaintiff's judgment aforesaid at any time & all times after the second Tuesday in November and before the first day of December then next ensuing; all which said defendants, before the said 23rd day of August, 1871, well knew.

And the plaintiff further states that the said defendants, neglecting their said official duty as supervisors of said town, did not, at any time within sixty days after the said 23rd day of August, 1871, nor at
11 any other time, order the town clerk of said town of Waldwick to put said judgment or the amount thereof in the then next tax-rol of said town, or into any other tax-roll of said town, nor was said judgment or the amount thereof put into said then next tax-roll of said town or any other tax-roll of said town by any person, and that after the service of said notice and after full knowledge of said judgment, and on or about the 17th day of November, 1871, they, the said defendants, acting in their said official capacity, levied town taxes to the amount of $1,390, for other purposes, and State and county taxes, upon the property of said town, but levied no tax in the year 1871, or at any time since, to pay said judgment of the plaintiff; that the taxes so levied by the defendants upon the taxable property of said town of Waldwick for the year 1871 were entered by said town clerk upon the tax-roll of said year and collected by the town treasurer of said town.

That the said town of Waldwick is, and in 1871 was, a large and wealthy town; the property thereof liable to assessment for taxation was assessed in said year by the town assessor at over two hundred thousand dollars, and the plaintiff is informed and believes that the actual value of the taxable property of said town is, and in 1871 was, over four hundred thousand dollars, and that had the amount of said judgment been put into said tax-roll of 1871 the same might readily have been collected and paid to the plaintiff; that said town of Waldwick has no property out of which to make said judgment, nor any resources for the payment thereof except by taxation; that the plaintiff has been and still is prevented, by the refusal of the said defendants to make said order for the inserting of his said judgment in said next tax-roll or any other tax-roll of said town, from collecting said judgment, to his damage sixteen hundred and fifty dollars and upwards; wherefore the plaintiff prays judgment against said defendants for his damages so as aforesaid by him sustained, together with the costs of this action.

MARINER, SMITH AND ORDWAY,
Plaintiff's Attorneys.

12 EASTERN DISTRICT OF WISCONSIN, *ss:*

Ephriam Mariner, being duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action; that the plaintiff

is not a resident of or within this State; that all the material allegations of the foregoing complaint are within the personal knowledge of this affiant; that this affiant makes this verification on behalf of the plaintiff, and has read the said complaint and knows the contents thereof, and that the same is true to the knowledge of this affiant, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

And this affiant states that he was the attorney for the said plaintiff, and obtained said judgments in the complaint mentioned; wrote and caused said notices to be given to the defendants; has obtained from the county records of Iowa County copies of the proceedings of the town supervisors of Waldwick for 1871; has corresponded with residents of said county of Iowa, in which county said town of Waldwick is situated; which are some of his means of knowledge and grounds of belief that said complaint is true.

E. MARINER.

Subscribed and sworn to before me the 8th day of August, 1872.

E. M. HUNTER,
U. S. Commissioner.

Appearance.

Circuit court of the United States for western district of Wisconsin.

ROBERT DOW, PLAINTIFF,
vs.
DAVID HUMBERT, BARTHOLOMEW SPELLMAN, and James Heath, defendants.

F. M. STEWART, Esq., *Clerk:*

Please enter our appearance as attorneys for the defendants in the above action.

Sept. 4th, 1872.

EMMONS AND HAMILTON,
Defts'. Attys.

13 And came the defendants, by Messrs. Emmons & Hamilton, their attorneys, and filed their demurrer to the plaintiff's complaint, herein filed, as follows, to wit:

Demurrer.

Circuit court of the United States for the western district of Wisconsin

ROBERT DOW, PLAINTIFF,
vs.
DAVID HUMBERT, BARTHOLOMEW SPELLMAN, and James Heath, defendants.

The defendants demur to the complaint in the above entitled action, because it does not state facts sufficient to constitute a cause of action.

EMMONS AND HAMILTON,
Attys. for Defendants.

I hereby certify that, in my opinion, the above demurrer to the complaint in the above-entitled action is well founded.

CHARLES A. HAMILTON,
Of Counsel for Defendants.

At a stated term of the circuit court of the United States of America for the western district of Wisconsin, in the seventh circuit, begun and held according to law, at the United States court-room in the city of La Crosse, in said district, on the third Tuesday, being the seventeenth day, of September, A. D. 1872, at eleven o'clock in the forenoon of said day; present and presiding, the Hon. Thomas Drummond, United States circuit judge, and the Hon. J. C. Hopkins, district judge.

14 On the 2nd day of said term, to wit, on the 18th day of September, A. D. 1872, the following proceedings were had, to wit:

ROBERT DOW
vs.
DAVID HUMBERT, BARTHOLOMEW SPELLMAN, and James Heath. } At law.

This day came the parties, by their counsel, and the demurrer interposed to the plaintiff's complaint herein came on to be argued, and, on hearing the argument, the decision of the court is reversed.

And afterwards, to wit, on the 6th day of said term, to wit, on the 24th day of September, A. D. 1872, the following proceedings were had, to wit:

ROBERT DOW
vs.
DAVID HUMBERT, BARTHOLOMEW and James Heath. ,

The demurrer to the complaint herein having been argued by counsel for and opposed thereto, on consideration thereof—

It is ordered by the court now here that the same be, and the said demurrer is, overruled, and the defendants are given twenty days after service of notice of this order upon their attorneys within which to answer complaint herein.

And came the defendants, by their attorneys, Messrs. Emmons and Hamilton, and filed their answer in said entitled cause, as follows, to wit:

15 *Answer.*

Circuit court of the United States, western district of Wisconsin.

ROBERT DOW
vs.
DAVID HUMBERT, BARTHOLOMEW SPELLMAN, and James Heath.

The defendants, by Emmons and Hamilton, their attorneys, for answer to the plaintiff's complaint, deny that the plaintiff recovered the judgment in his first cause of action alleged, and aver that there is no record of the said judgment. For answer to the second cause of action these defendants allege and show that the judgment therein mentioned was recovered upon a certain bond, with coupons, made by the town of Waldwick on or about Dec. 16th, 1856, and that said town then embraced within its limits the whole of the present town of Moscow, and from which town of Waldwick said town of Moscow was set off on or about

the 19th day of November, 1859; and that said judgment, if a debt, is chargeable, to the extent at least of $37\frac{1}{10}$ per cent., to the said town of Moscow, and to that extent payable by said town of Moscow; that these defendants are advised and believe said judgment, only to the extent of $62\frac{9}{10}$ per cent., is chargeable to, and payable by, said town of Waldwick; and that these defendants had no power nor authority to order the whole of said judgment to be placed on the tax-roll of said town of Waldwick pursuant to the notice of the plaintiff, as alleged in his complaint; and they deny that the plaintiff, by their omission to do so, has been damaged in the sum stated in his complaint.

EMMONS AND HAMILTON,
Defts.' Attys.

WESTERN DISTRICT OF WISCONSIN, *ss:*

David Humbert, Bartholomew Spellman, and James Heath,
16 being severally sworn, each for himself says that he is one of the defendants in this action; that the foregoing answer is true of his own knowledge, except as to those matters therein stated on his information and belief; and as to those matters, he believes it to be true.

DAVID HUMBERT.
B. SPELLMAN.
JAS. HEATH.

Subscribed and sworn to before me this 11th day of December, A. D. 1872.

WILLIAM T. HENRY,
United States Commissioner Western District of Wisconsin.

At a stated term of the circuit court of the United States of America, in the seventh circuit and western district of Wisconsin, begun and held according to law, at the city of Madison, on the first Monday, being the second day, of June, A. D. 1873—present and presiding, the honorable David Davis, associate justice of the Supreme Court of the United States, and the honorable James C. Hopkins, district judge—on the 14th day of said term, to wit, on the 17th day of June, A. D. 1873, the following proceedings were had, to wit:

Trial and verdict.

ROBERT DOW
vs.
DAVID HUMBERT, BARTHOLOMEW SPELLMAN, and James Heath. } At law.

This day came the parties, with their counsel, and the issue herein came on to be tried. Whereupon a jury is ordered to come, who came, to wit: Thomas Gillespie, T. D. Lang, Phineas Baldwin, William Dano, A. W. Bowman, Silas E. Pearson, George Brown, W. H. Angell, J. G. Hall, John H. Griffiths, John Curry, and Hans Grindy, who were all duly elected, tried, and sworn; and, after hearing the evidence and arguments of counsel, retire to consider of their verdict. And come the
17 jurors of the jury aforesaid into court, and upon their oaths do say that they assess nominal damages to the said plaintiff at the sum of five dollars. Whereupon it is considered and adjudged by the court now here that the said plaintiff do have and recover of the

said defendants the said sum of five dollars damages, so as aforesaid assessed by the jury, without costs. And it is further ordered and adjudged by the court that the said defendants do have and recover of the said plaintiff the sum of fifty-five dollars and thirty-five cents for their costs in and about their said suit in this behalf expended.

On the hearing of said cause the following exceptions were taken, and were allowed by the court and made of record, and are in the words and figures following, to wit:

Bill of exceptions.

In circuit court of the United States, western district of Wisconsin.

ROBERT DOW, PLAINTIFF,
against
DAVID HUMBERT, BARTHOLOMEW SPELLMAN, and James Heath, defendants.

Be it remembered that afterwards, to wit, at a term of the circuit court aforesaid, held at the United States court-house, in the city of Madison, in and for said district, on the 17th day of June, A. D. 1873, before Hon. David Davis, associate justice of the Supreme Court of the United States, and Hon. James C. Hopkins, district judge, presiding, the aforesaid issues, so joined between the said parties as aforesaid, came on to be tried by a jury for that purpose duly empannelled and sworn to try the same; at which time and place came the said plaintiff, as well as the said defendants, by their respective attorneys aforesaid, and the said plaintiff, to maintain the said issues on his part, offered in evidence a duly-certified copy of a judgment-record, purporting to have been re
covered and rendered in the circuit court of the United States
18 for the eastern district of Wisconsin on the 27th day of October,
1870, for the sum of seven hundred and eight dollars and ninety cents, which said judgment was recovered upon coupons or interest-warrants attached to the same bonds upon which the second judgment in said complaint mentioned was recovered; to the introduction of which in evidence the defendants, by their said attorneys, did then and there object, because it was immaterial and variant from any and each of the judgments mentioned in said complaint, and because no notice of the said judgment so offered had been given to the defendants, which objection was then and there sustained by the court; and to which ruling and decision the plaintiff, by his said counsel, did then and there duly except.

And the said plaintiff, further to maintain the said issues upon his part, read in evidence the original record of the judgment secondly by him pleaded in his said complaint, which said judgment was rendered on the 10th day of June, 1871, in the said circuit court of the United States in and for the western district of Wisconsin, for the sum of $1,531.56, and was recovered upon bonds of the said town of Waldwick, issued under the provisions of an act of the legislature of the State of Wisconsin, approved March 23rd, 1853; which said bonds were in the record, and were in words and figures following, viz:

UNITED STATES OF AMERICA,
State of Wisconsin.

No. 6. [$500.

Bond of the town of Waldwick.

Issued in pursuance of a special vote of the citizens as authorized by an act of the legislature of Wisconsin.

Know all men by these presents that the town of Waldwick, in the county of Iowa and State of Wisconsin, for and in consideration of five shares of one hundred each of the capital stock of the Mineral
19 Point Railroad Company, is justly indebted and promises to pay to Francis Vivian, treasurer of said Mineral Point Railroad Company, or his successors in office, or bearer, the sum of five hundred dollars, on the first day October, A. D. 1870, at the bank of the Manhattan Company, in the city of New York, with interest at the rate of eight per cent. per annum, payable semi-annually on the first day of April and October of each year at the said bank, on surrender of the respective coupons annexed. For the payment of principal and interest the faith and credit of the said town of Waldwick are inviolably and irrevocably pledged.

This obligation is one of twenty bonds of five hundred dollars each, respectively numbered from one to twenty, inclusive, for which the town of Waldwick agrees to provide by a special tax of one thousand dollars per annum, voted for by the people of said town in pursuance of an act of the legislature of Wisconsin approved March 23rd, 1853, entitled An act to authorize the counties and towns through which the Mineral Point Railroad passes to aid in the construction; and it is further agreed that all such sums to which the said town shall be entitled to for dividends or any stock in said railroad company shall be applied to the payment or purchase of any of said bonds which can be bought at or below par.

This obligation, and all rights and benefits arising therefrom, may be transferred by general or special endorsement or by delivery, as if the same were a note of hand payable to bearer.

In witness whereof the said town of Waldwick has caused these presents to be signed by the chairman of the board of supervisors and the clerk of said town the first day of October, A. D. 1856.

GEORGE MATTHEWS,
Chairman of the Board of Supervisors.

JOHN S. REEVES,
Town Clerk.

20 STATE OF WISCONSIN,
Iowa County:

I hereby certify that George Matthews was chairman of the board of supervisors and John S. Reeves was town clerk of the town of Waldwick at the date of the foregoing bond by them subscribed, and that their signatures thereto are genuine.

In witness whereof I have hereunto set my hand and affixed my official seal this 16 day of December, A. D. 1856.

[L. S.] ARTHUR BRITTAN,
Clerk of County Board of Supervisors.

The plaintiff's testimony was here closed and his case rested.

Whereupon the defendants, to maintain said issues on their part, offered in evidence copies of certain proceedings of the county board of the supervisors of Iowa County, Wisconsin, showing a division of said town of Waldwick on the second day of April, 1860, and after the issuing of said bonds, as pleaded in their answer, and containing no mention of said bonded debt or apportionment thereof; to the introduction of which in evidence, for any purpose and all purposes, the plaintiff did then and there object, because immaterial and irrelevant; which objection was sustained by the court so far as introducing the same as a defense was concerned, but overruled so far as to allow the same to be read upon the question of damages, and the said records were read under said ruling upon the question of damages only; to which ruling and decision of the court in allowing said records to be read in evidence upon the question of damages the plaintiff, by his counsel, did then and there except.

The defendants thereupon, further to maintain the issue on their part, offered and read in evidence a certified copy of the records of the town clerk of the said town of Waldwick, stating that the same were offered solely upon the question of damages. Said copy was as follows, viz:

21 At a meeting of the board of supervisors of the town, held on the 22nd day of November, A. D. 1872; present, D. Humbert, chairman, B. Spellman, John Jackson, supervisors.

At which time the following business was transacted: Computation of amount due upon the judgment below mentioned against the town of Waldwick, Iowa County, made as a basis to levy taxes to pay the same, in compliance with notices served upon the supervisors of said town, viz:

United States circuit court, western district of Wisconsin.

ROBERT DOW
vs.
THE TOWN OF WALDWICK.

Judgment dated June 16, 1871, for	$1,531 56
Interest at 7 per cent. to Jan'y 27*rd*, 1873, (being last Monday in Jan'y)—1 yr. 7 mo. 11 da.	173 00
Total	$1,704 56

Resolved, That, in compliance with notice served upon the board of supervisors of the town of Waldwick by the attorneys for the plaintiff in above-entitled action, and to avoid threatened litigation in the above case, there be, and there is hereby, levied upon all of the taxable property of the said town of Waldwick the sum of one thousand seven hundred and four dollars and fifty-six cents as a tax for the year A. D. 1872 to pay and satisfy said judgment, costs, and interest thereon, as stated and computed above.

Resolved, That the town clerk of said town of Waldwick be, and he hereby is, requested and ordered to put said taxes so levied in the tax-roll for the year 1872 with the other taxes, according to law, and pursuant to chapter 143 of the laws of this State for the year 1871; and the town treasurer is also hereby requested and directed to proceed & collect said tax with the other regular taxes, according to law, and when so collected he is to pay the same over to the said parties, or their attorneys, to satisfy said judgment.

Resolved, That the board of supervisors of the town of Waldwick do hereby protest against being ordered or noticed to levy said
22 taxes, for the reason that if payment of the said judgment is to be enforced it should be enforced also against the town of Moscow for its due proportion thereof; and the said town, in levying said tax, in no way admits its right to do so or its liability for the amount of said judgment, but claims and reserves the right to have the same settled and adjusted according to the share and terms heretofore agreed upon by the town of Waldwick and said town of Moscow.

I, J. C. McKee, clerk of the town of Waldwick, Iowa County, Wis., do hereby certify that I have carefully compared the above and foregoing with town *of* book of records in my office, as town clerk, and that the same is a correct transcript therefrom.

Dated at Waldwick this 2nd day of Jan., 1873.

J. C. McKEE,
Town Clerk.

To the receiving of which said records in evidence for the purpose offered, or for any purpose, the plaintiff, by his counsel, did then and there object, because immaterial; which objection was overruled by the court, and said records were read in evidence for the purpose offered; to which said ruling and decision of the court the plaintiff, by his counsel, did then and there except.

The foregoing was all the testimony received upon said trial.

And thereupon, after the testimony was closed, the counsel for the plaintiff did then and there request said court to instruct said jury as follows, viz:

1st. Upon the undisputed testimony in this case the plaintiff is entitled to recover of the defendants the full amount of his two judgments mentioned in the complaint, with interest upon each at seven per cent. from the date of the rendition of each.

23 The said court then and there refused to so instruct said jury; to which said refusal and decision the plaintiff, by his said counsel, did then and there except.

2nd. That the plaintiff is entitled to recover from the defendants the full amount of his second judgment by him so pleaded; that is to say, the sum of $1,531.56, with interest thereon at seven per cent. from June 10th, 1871.

The said court then and there refused to give the said second instruction to said jury; to which said refusal and decision the plaintiff, by his said counsel, did then and there except.

And thereupon the court instructed the jury as follows: "The jury are instructed upon the whole evidence in the case that the plaintiff is entitled to recover nominal damages from the defendants by reason of their failure to direct the levy of the tax in question. The plaintiff is not entitled to recover any more, because he has not shown that he has suffered any injury from the neglect or omission of the defendants to cause the clerk to put the judgment on the next tax-roll of the town."

To the giving of so much of said instruction as is embraced in the following words, "the plaintiff is not entitled to recover any more, because he has not shown that he has suffered any injury from the neglect or omission of the defendants to cause the clerk to put the judgment on the next tax-roll of the town," the plaintiff, by his counsel, did then and there duly except.

And to the direction and instruction of said court to said jury, "that

the plaintiff was entitled to recover 'nominal' damages of the defendants," the plaintiff, by his said counsel, did then and there also duly except.

And because the said exceptions and decisions do not appear of record herein, the judge who presided at the trial of said cause hath, upon the request of the said plaintiff, to this bill of exceptions set his hand, as by statute in such case made and provided, this third day of July, 1873.

DAVID DAVIS, [SEAL.]
Presiding Judge.

24 On this day, to wit, the 15th day of September, A. D. 1873, said plaintiff, by his attorneys, filed in said court, in said entitled cause, his petition for writ of error; which said petition is in the words and figures following, to wit:

Petition.

United States circuit court, western district of Wisconsin.

ROBERT DOW
vs.
DAVID HUMBERT, BARTHOLOMEW SPELLMAN, and James Heath.

To the judge of the circuit court of the United States for the western district of Wisconsin:

The undersigned, Robert Dow, the above plaintiff, respectfully represents that he is aggrieved by the judgment of said circuit court rendered on the 17th day of June, 1873, in favor of said plaintiff for the sum of five dollars damages and for costs against said plaintiff taxed and allowed in favor of said defendants at the sum of fifty-five dollars and thirty-five cents; and your petitioner prays your honors to allow and grant a writ of error from said judgment to the Supreme Court, according to law, and herewith offers to your honors a bond for costs and damages in the penal sum of five hundred dollars, for approval.

ROBERT DOW,
By MARINER, SMITH AND ORDWAY,
His Attorneys.

(Endorsed:) Writ allowed as within prayed.
Sept. 15, 1873.

J. C. HOPKINS,
U. S. Dist. Judge.

On this day, to wit, the 15th day of September, A. D. 1873, said plaintiff, by his attorneys, filed in said court, in said entitled cause, his bond on writ of error; which said bond is in the words and figures following, to wit:

25 *Bond on appeal.*

Supreme Court of the United States.

Know all men by these presents that we, Ephriam Mariner and David S. Ordway, of the city of Milwaukee and State of Wisconsin, are

held and firmly bound unto David Humbert, Bartholomew Spellman, and James Heath in the penal sum of five hundred dollars, lawful money, to be paid to the said obligees, or to their certain attorneys, heirs, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, each and every of them, jointly and severally, by these presents, sealed with our seals and dated the 13th day of September, 1873.

The condition of this obligation is such that whereas one Robert Dow is about to sue out a writ of error to the Supreme Court of the United States from a judgment of the circuit court of the United States for the western district of Wisconsin, in favor of said Robert Dow and against the said David Humbert, Bartholomew Spellman, and James Heath, rendered in said circuit court on the seventeenth day of June, 1873, for damages in favor of said Robert Dow to the amount of five dollars, and for fifty-five dollars and thirty-five cents costs of said suit allowed and adjudged against Dow in favor of said obligees:

Now, therefore, if the said Robert Dow shall prosecute his said writ of error to effect, and pay all damages and costs that may be adjudged against him if he fail to make the same good, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

E. MARINER. [L. S.]
DAVID S. ORDWAY. [L. S.]

Signed, sealed, and delivered in presence of
SAM. M. DIXON.

26 EASTERN DISTRICT OF WISCONSIN, *ss:*

Ephriam Mariner and David S. Ordway, of the city and county of Milwaukee, in said district, being duly sworn, each for himself says that he is one of the obligors mentioned in the above bond, that he is a resident within said city of Milwaukee and a freeholder of the State of Wisconsin, and is worth the sum of five hundred dollars over and above all his debts, liabilities, and exemptions.

E. MARINER.
DAVID S. ORDWAY.

Subscribed and sworn to before me this 13th day of September, 1873.
[L. S.] SAM. M. DIXON,
Notary Public, Milwaukee Co., Wis.

(Endorsed:) Approved September 15th, 1873.
J. C. HOPKINS,
U. S. Dist. Judge.

On this day, to wit, the 15th day of September, A. D. 1873, the plaintiff, by his attorneys, filed in said court, in said-entitled cause, his citation on writ of error, as follows, to wit:

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To David Humbert, Bartholomew Spellman, and James Heath, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next ensuing, pursuant to a writ of error filed in the

office of the clerk of the circuit court of the United States of America for the western district of Wisconsin, wherein Robert Dow is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not
27 be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Nathan Clifford, first associate justice of the Supreme Court of the United States of America, at Madison, the 15th day of September, 1873, and of our Independence the ninety-eighth.

J. C. HOPKINS,
U. S. District Judge.

(Endorsed:) I accept service of the within citation this 16th day of September, 1873.

N. J. EMMONS,
Atty. for Deft. in Error.

WESTERN DISTRICT OF WISCONSIN, *ss:*

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings now remaining of record and on file in my office in the above-entitled cause, and that it is a correct transcript therefrom; and also a true copy of the security on the writ of error, and the original citation and service thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in the city of Madison, this 2nd day of October, A. D. 1873, and of our Independence the ninety-eighth.

[SEAL.] F. M. STEWART, *Clerk.*

(Indorsement on cover:) No. 306. Robert Dow, plaintiff in error, vs. David Humbert, Bartholomew Spellman, and James Heath. W. Wisconsin C. C. U. S. Filed 25th October, 1873.

Supreme Court of the United States.

ROBERT DOW,

Plaintiff in Error,

vs.

DAVID HUMBERT, BARTHOLOMEW SPELMAN and JAMES HETH.

Defendants in Error.

Brief for Plaintiff in Error.

MATT. H. CARPENTER AND
E. MARINER,
Counsel for Plaintiff in Error.

J. H. YEWDALE & SONS, PRINTERS, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES.

ROBERT DOW,

Plaintiff in Error,

vs.

DAVID HUMBERT, BARTHOLOMEW SPELMAN AND JAMES HETH,

Defendants in Error.

By Chapter 117, of the laws of Wisconsin, of 1853, the town of Waldwick, through which the Mineral Point Railroad runs, was authorized to subscribe to the stock of said company, and to issue bonds to pay therefor. And, by the 7th section of that act, it was made the duty of such town to levy a tax to pay such bonds. The town neglected to pay the interest on the bonds, and the plaintiff in error being the holder of two of them, in November, A. D. 1869, commenced suit in the Circuit Court of the United States, for the District of Wisconsin, and on the 22nd day of October, 1870, recovered judgment for $708.90. On the 30th day of June, 1870, Congress passed an act creating the Western District of Wisconsin, the third section of which provides, "that the District of Wisconsin shall hereafter consist of the counties of said state not named in this act, and shall be called the Eastern District of Wisconsin," etc. On the 10th day of June, 1871, the plaintiff in error recovered another judgment in the Circuit Court of the United States for the Western District of Wisconsin for the sum of $1,531.56, for the principal and subsequently accrued interest of said bonds.

Section 77, Chapter 15 of the Revised Statutes of Wisconsin for 1858, page 186, provides: "No execution shall issue upon any judgment against a town, nor shall any action be brought thereon, but the same shall be collected in the manner hereinafter provided in this chapter. Section 78 of the same chapter provided in what manner judgment should be levied and assessed by the town officers upon the taxable property of the town: but by chapter 153 of the laws of 1867, this section was amended by adding a proviso, that said section should not apply to any judgment rendered by the District or Circuit Courts of the United States, for the District of Wisconsin. In this state of the law the legislature passed, chapter 143 of the laws of Wisconsin for 1871, to regulate the collecting of judgments against towns which is as follows:

Section 1. No judgment, award or finding, of or for any sum of money against any town, by any Court or Judge, shall be entered upon the tax-roll thereof, by the clerk thereof, unless upon the order of the supervisors of such town.

Section 2. The Supervisors of any town, shall within sixty days of the notice of the rendition of any judgment or award against the town by any Court, order the clerk thereof to put the same in the next tax-roll of the town, provided, however, that in all cases of the rendition of any judgment or award, or finding by any Court previous to the passage and publication of this act, such town shall have sixty days from and after the time this act shall take effect, to appeal therefrom, or to make such order.

Section 3. All other acts or parts of acts, so far as they effect or contravene any of the provisions of this act, and no further, are repealed.

This act was published March 30th, 1871, and before the defendants were elected.

On the 23d day of August, 1871, the plaintiff served notice in writing upon each of the defendants as follows:

UNITED STATES CIRCUIT COURT, DISTRICT OF WISCONSIN.

Robert Dow
vs.
The Town of Waldwick. } Judgment, dated Oct. 27, 1870, $708.90.

To the Supervisors of the Town of Waldwick:

You and each of you will please take notice that judgment was rendered against said town for the amount, at the date and in the cause above set forth, that said judgment is wholly unpaid, and that I demand of you that you order the clerk of said town to put the said judgment into the next tax-roll of said town, pursuant to the provisions of chapter 143, of the laws of this state for the year 1871, to be collected. Yours, etc.,

E. MARINER, Plaintiff's Attorney.

And served a similar notice at the same time in the case in the Western District, except that the title was "United States Circuit Court for the *Western* District of Wisconsin.

The supervisors of the town neglected to order the town clerk to put either of the judgments in the next tax-roll, pursuant to such demands, and on the 10th day of August, 1872, the plaintiff brought his suit against the defendants in error, claiming to recover from said defendants the full amount of said judgments and his costs.

The cause was tried before Mr. Justice Davis and the district judge, in June, 1873. The suit was commenced after the passage of the practice act of June 1st, 1872, by which practice and pleadings were in common law actions required to conform to the practice of the State Circuit Court, which practice, as far as is material to this case, is found in Revised Statutes of 1858, chapter 125, as follows:

Section 10. The answer of the defendant must contain—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant or of any

knowledge or information thereof sufficient to form a belief.

Section 31, of that chapter, provides: Every material allegation of the complaint not controverted by the answer, as prescribed in section 10, of this chapter, and every material allegation of new matter in the answer constituting a counter-claim not controverted by the reply, as prescribed in section 15, of this chapter, shall, for the purposes of the action, be taken as true.

No allegation of the complaint in this action is controverted, except the allegation of the recovery of the judgment first pleaded, in the United States Court *for the District of Wisconsin*, which controversy is upon the question as to whether that title describes the Court sitting in the Eastern District of Wisconsin.

Every other allegation in the complaint is admitted. The recovery of the second judgment, the service of the demand to levy the tax to pay both judgments; the duty of the supervisors to require the clerk to put the judgment in the next tax-roll, the fact that there was a clerk to perform the duty, the fact that no one except the defendants in error could require the judgment to be put in the tax-roll, the facts that the tax-roll was made out under the direction of the defendants, and the tax levied for the year, not including these judgments, which was collected; the fact that the taxable property in the town was $400,000 worth —that if the amount of these judgments had been put in the tax-roll they would readily have been collected and paid to the plaintiff; that the town of Waldwick has no property out of which to make such judgment nor any resources for the payment thereof, except taxation; that the plaintiff was prevented, by the refusal of the defendants, from collecting the judgment, are all admitted.

The law of Wisconsin, section 77, chapter 15, Revised Statutes, 1858, prohibits the issuing of any execution on a judgment against a town, and prohibits any other suit being

brought upon a judgment, and in lieu thereof provides that upon demand of a judgment creditor the supervisors of the town shall levy a tax and put the same in the next tax-roll of the town after demand.

Upon trial of the cause the plaintiff offered in evidence a certified copy of the record of the judgment rendered in the Circuit Court of the United States in the case of the plaintiff in error against the town of Waldwick, commenced in the Circuit Court of the United States for the District of Wisconsin, rendered October 27, 1870, and after the division of the district, for seven hundred and eight dollars and ninety cents. The defendants in error objected to such record for the reason that it varied from the record set out in complaint and from the notice given to defendants to levy the tax in that the venue of the title of the complaint and notice was the District of Wisconsin. At the time of the rendition of the judgment the Court was called *Eastern* District of Wisconsin. The Circuit Court sustained the objection, and the plaintiff in error excepted.

The Court on the trial allowed the defendants in error to introduce the record and proceedings of the board of supervisors of Iowa county, showing the division of the town of Waldwick in April, 1860, after the issuing of the bonds but containing no mention of said bonded debt, nor any apportionment thereof, against the objection of the plaintiff, but only in mitigation of damages; to which the plaintiff excepted.

The Circuit Court on the trial also allowed the defendants to put in evidence in mitigation of damages a transcript of the proceedings of the Board of Supervisors of the town, showing a levy of a tax by the Supervisors made in November, 1872, after this action was brought, to pay the amount of the second judgment and an order upon the clerk to put the same in the tax-roll, against the objection of the plaintiff, to which he excepted.

On the trial of the cause the plaintiff's counsel prayed the Court to instruct the jury as follows:

First. Upon the undisputed testimony in this case the plaintiff is entitled to recover the full amount of his two judgments mentioned in the complaint, with interest upon each at seven per cent. from the rendition of each.

The Court refused and the plaintiff excepted.

Second. The plaintiff is entitled to recover from the defendants the full amount of his second judgment by him so pleaded, that is to say the sum of $1531.56, with interest thereon at seven per cent. from June 10, 1871.

The Court refused and the plaintiff excepted.

And thereupon the Circuit Court charged the jury as follows: The jury are instructed upon the whole evidence in the case, that the plaintiff is entitled to recover nominal damages from the defendants by reason of their failure to direct the levy of the tax in question. The plaintiff is not entitled to recover any more because he has not shown that he has suffered any injury from the neglect or omission of the defendants to cause the clerk to put the judgment in the next tax roll of the town."

The plaintiff excepted to so much of the charge as is in the words following: "The plaintiff is not entitled to recover any more because he has not shown that he has suffered any injury from the neglect or omission of the defendants to cause the clerk to put the judgment in the next tax roll of the town."

THE PLAINTIFF ASSIGNS AS ERRORS.

First. The rejecting by the Court of the record of the judgment recovered in the Eastern District of Wisconsin.

Second. The admission in mitigation of damages of the proceedings of the Board of Supervisors of Iowa County, in April, 1860, dividing the Town of Waldwick.

Third. The admission for that purpose, of the proceedings of the town board in November, 1872, ordering the second judgment to be put in the tax roll, and levying a tax to pay it.

Fourth. The refusal to charge the jury that the plaintiff was entitled, on the testimony to recover the full amount of both judgments with interest.

Fifth. The refusal to charge the jury that plaintiff was entitled to recover the full amount of the second judgment and interest.

Sixth. The instruction to the jury that the plaintiff was entitled to recover no more than nominal damages, because he had not proved that he has suffered any injury from the neglect of the defendants to require the clerk to put the judgments in the tax roll.

I.

The variance in the title of the Court between the record offered and the complaint and notice resulted from the failure of the plaintiff's attorney to change the title of the cause in his docket, when the act was passsd dividing the district. It could not mislead. The suit was commenced against the town, in the Circuit Court for the District of Wisconsin, before the passage of the act of June 30, 1870, dividing the District of Wisconsin, the town was so summoned. The Court sitting in what is now known as the Eastern District of Wisconsin, had been known for ten years by the name of the Circuit Court for the District of Wisconsin. The act of Congress referred to provides that the whole state except the counties specified "shall constitute *the District of Wisconsin*, but shall be known as the Eastern District of Wisconsin."

There is no pretense that there was any other judgment

against the town of Waldwick of that date and amount than the one set out in the complaint and specified in this notice. The defendants in error are the principal officers of the town of Waldwick, and service of any summons upon the town must have been made upon them or one of them.

Section 20, chapter 120, Revised Statutes 1858. Section 1, chapter 148, and section 61, chapter 15, Id.

So that the defendants had notice of the suit and of the recovery of judgment, and were not mislead by the notice, served; the variance was therefore immaterial.

Nash vs. Town, 5 Wallace, 689.

In The Mayor vs. Lord, 9 Wallace, 409, this Court decided that a mistake in a title which did not mislead was immaterial.

Section 33, chap. 125, Revised Statutes of 1858, provides that no variance between the allegation in a pleading and the proof shall be deemed material unless it shall actually mislead, &c.

II.

The Court erred in admitting the proceedings of the county board, dividing the town, in mitigation of damages. There is no claim for punitive damages. The duty neglected by the defendants was the substantial act to be done in collecting the debt. The complaint is that the defendants well knowing their duty to make the order, omitted to make it, whereby the plaintiff was prevented from *collecting his money*; and by way of alleging special damages, it alleges that no one but the defendants, as they well knew, could make this order; that the tax which was levied was collected, and that if the plaintiffs judgment had been inserted in the roll, the amount would have been collected. It is not mitigating to an action for not collecting, that

we have a good judgment—we had that in the beginning. If the debt had been apportioned between the respective portions of the town, it might have been a defense to the action when brought; but by the recovery of the judgment the liability of the town as it was constituted at the time of the recovery of the judgment, was fixed; it was in the power of the defendants or supervisors, to take an appeal from the judgments against the town if they saw fit, but if they elected not to appeal, there was then no discretion upon the part of the supervisors to do otherwise than to make the order and levy the tax.

The Mayor vs. Lord, 9 Wallace 411.
Bushnell vs. Gates, 22 Wis., 210.

III.

The Circuit Court erred in admitting the proof that the defendants four months after this action was brought, made an order requiring the clerk to put the second judgment in the roll, and levied a tax to make it without following it, or offering to follow it with proof that the tax had been collected. This offer was made six months after the town treasurer's warrant to collect such tax was returnable. If the levy was made in good faith, the tax should have been collected.

There was no authority upon the part of the Supervisors at that time to put the tax into the roll. The requirement of the notice and the requirement of the statute is to put the judgment in the *next* tax-roll of the town, after service of the notice. The notice was served in 1871. The order to levy the tax is a statutory power and must be strictly followed.

The rights of the parties were fixed by the demand of the plaintiff and the neglect of the defendants in 1871, and the bringing of the action in 1872. If the plaintiff was

entitled to his judgment against the defendants in error, for the amount of the judgments against the town or either of them, nothing except the satisfaction of that judgment in whole or in part, may be pleaded or given in evidence in bar of this action. The testimony does not show that the tax so levied was ever collected—as a matter of fact it has never been collected. The town treasurer neglected to qualify, the defendants refused to appoint a new town treasurer, as they were required to do by law, Section 102—4, ch. 18, R. S. 1858, and while this does not all appear by the record, it does appear by the law, R. S. 1858, Sec. 61, Ch. 18, R. S. that the treasurer must return his roll before the last Monday of January, 1872, and there is no pretense that the money has been paid.

Matter in mitigation must, according to the practice in the State Courts, be pleaded. McKyring vs. Bull, 16 N. Y., 207; Kniffen vs. McConnell, 30 N. Y., 290; Morrell vs. Insurance Co., 33 N. Y., 443. The plaintiff is entitled under our practice to know what the defence is to be. The suit is tried a long way from where the parties reside and from where the town records were kept. An inquiry as to this levy would at once have shown, what the record of the case of Bowen vs. the supervisors of Iowa county will show, that that levy was collusive, that it had been agreed by all the authorities of Iowa county, in order to get rid of ten or fifteen writs of mandamus from the Circuit Court of the Eastern District, which it was thought advisable not to keep off any longer, to levy a tax for everything that year, and have the town collectors neglect to give bonds, and so the supervisors would be powerless to collect a tax, and make that as a return to the writs. The plaintiff might have shown this, or he might have shown any other matter which would show that such levy was collusive or in bad faith.

IV.

The plaintiff requested the Court to instruct the jury that he was entitled to a verdict for the amount of both judgments, and this being refused, that he was entitled to a verdict for the amount of the judgment recovered in the Western District. But the Court refused so to instruct the jury, and instructed them that the plaintiff was entitled to recover nominal damages, and no more. These refusals to charge and the charge given are the subjects of the last three exceptions and enunciate substantially the same proposition, that only nominal damages can be recovered on the evidence.

It was the duty of these defendants to make the order to put these judgments in the roll. Without such order the judgments could not be put in the roll. The tax roll made out in 1871, into which the defendants were required to put these judgments, was collected; if these judgments had been included they would have been collected and the money paid to the plaintiff; the plaintiff has been prevented, by the refusal of the defendants to make the order levying the tax from collecting his judgments.

The defendants were required to do an act *about the collection* of the debt, which performed, the debt would have been collected. The property liable to pay this debt can only be reached through these supervisors. No one but they can perform this duty. The case is stronger than that of an ordinary debtor; he may pay his debt voluntarily, or the creditor may force it by reason of his lien upon the debtor's real property, but the pleadings admit that the town has no property nor any means of paying this debt except by taxation, and only these supervisors can levy a tax. These are material facts and must not be overlooked. If there were a hundred other men to whom this plaintiff could have applied to levy this tax and cause it to be collected, the damages might possibly be nominal but he was obliged by law to go to these officers, and

he must go to them again, if they are not charged with this debt in this action. They are the officers of the law, who have undertaken to discharge the duties of this public office. They are the sheriffs to collect judgments against their town, O'Connell vs. Regina, 11 Cl. & F. 156, with authority to appoint bailiffs under them in case those the town elects, refuse to perform the duties of the office.

The power of the supervisors to levy the tax and put the judgment in the tax roll is provided by the statute in express terms to be in place of an execution upon the judgment, which is prohibited. It is a duty of their office, they are paid for it. The law gives the plaintiff the right and power to require of them that they put these judgments in the tax roll and levy a tax to make the amount of the roll, just as the law gives the plaintiff the power to require the sheriff to make a judgment from the property of an individual, section 8, chapter 135, R.S. 1858, and for the same purpose. They have perversely refused to perform this duty and the result has been that the plaintiff has been, and if this judgment is affirmed, forever will be, prevented from recovering his debt. Their duty is to perform as between the judgment creditor of this town and the town what the sheriff does as between judgment creditors, and all other all persons and corporations not municipal, being judgment debtors. They owed the duty to the plaintiff upon receiving such notice as is proved in the case, to take such steps as the record admits would have brought the plaintiff his debt on the return day of the town treasurer's warrant. Why should they not be responsible as the sheriff is? The sheriff would not be allowed to prove that the defendant was abundantly able to pay the debt if the sheriff was only disposed to make him, nor that the sheriff did make a levy after the writ expired, or that he had made one a year after he was by law required to do it, nor would he be allowed to make that proof six months after the money ought to have been made from such levy, if one

had been made in good faith; nor that he did make a levy without proving that the money was made under it. Such proof would aggravate rather than mitigate the damages. It is substantially answering to an action for not doing, I could do it and can still. No judge or jury would consider such testimony as other than evidence of bad faith on the part of the sheriff, of a design to abuse his process.

That the sheriff, if he had been charged with the duty of collecting these judgments, would, under the circumstances, be adjudged to pay the full amount of the plaintiff's debt is supposed to be the settled law of this country.

. In the commonwealth vs. Contner, 18 Pa. St., 439, the Supreme Court of Pennsylvania, held "that a sheriff was prima facie, liable for the amount of the execution, but he might show that by no dilligence could he have collected so much."

In Harris vs. Kirkpatrick, 35 N. J., 392, the Supreme Court amerced the sheriff to the full amount of an execution which he might have made, but neglected to make.

In Kemp vs. Williams, 43 Ga. the sheriff took the defendants word that he would pay during the life of the writ, and neglected to levy, the Court held the sheriff liable for the full amount of the writ.

In Hootman vs. Schriner, 15 Ohio, St. 43, the Supreme Court held that the sheriff sued for an escape, could not show that the debt was still collectable from the escaped prisoner.

See also Dumphey vs. Mitchell, 25 Mich., 10.

In Ledyard vs. Jones, 3 Seld. 550, the Court of appeals held in an action against the sheriff for failure to return, that the plaintiff need not prove special damages, and that the sheriff could not prove in mitigation that the debt might still be collected.

In Weld vs. Bartlett, 10 Mass. 470, the Court held that

the sheriff might prove in mitigation of damages that the defendant was insolvent at the time of the escape, that the prisoner was of no pecuniary ability, and no other defense was admitted. This case has been followed in nearly all the States.

The same rule has been applied to the ministerial act of a magistrate, as to that of the sheriff. Noxen vs. Hill, 2 Allen 215.

It is the established law of the United States, that when a sheriff is required to arrest on mesne process and neglects to do so he is liable after execution returned unsatisfied for the whole debt. Metcalf vs Stryker, 31 N. Y. 235. Eaton vs. Ogier, 2 Maine 46.

It was contended below that the defendants were not liable to damages as sheriffs were, because they were public officers paid by the public, not by individuals, and therefore owed duty to the public only, and not to individuals—while sheriffs and clerks performed duties for individuals for which duties they received specific rewards.

This Court held in Amy vs. The Supervisors, 11 Wallace 136. "That the rule was well settled that when the law required, absolutely, a ministerial act to be done by a public officer, who neglected or refused to do such act, he might be compelled to respond in damages to the extent of the injury arising from his conduct. A mistake as to his duty and an honest intention will not excuse the offender."

See also Robinson vs. Chamberlain, 34 New York 389. Hover vs. Barkhoof, 44 N. Y. 113. Mersey, Docks Cases, 3 Hurlstone aud Coltman, 1035 Am. Ed.

This decision leaves open in this Court only the question of the amount of damages:

In The King vs. The Bank of England, Douglass 507. Lord Mansfield held: That in the case of a refusal to permit the transfer of stock upon the books of the bank, an

action on the case would lie "*for complete satisfaction equivalent to specific relief.*"

In Henly vs. The Mayor of Lyme, 5 Bingham 91. Chief Justice Best says: "It seems to me that all of these cases establish the principal that if a man takes a reward, whatever be the nature of that reward, whether it be in money from the crown, whether it be in lands from the crown, whether it be in lands or money from any individual for the discharge of a public duty, that instant he becomes a public officer and if by any act of negligence or any act of abuse in his office, any individual has sustained an injury, that individual is entitled to redress in a civil action."

In the Mersey Docks cases supra, which were actions on the case against the Comissioners of the Docks, who received no pay whatever for their services, for the negligence of their servants, the House of Lords after taking the opinion of tho judges decided, page 1056, that a public officer who performed the duties of his office without profit or reward, was liable to an individual for damages accruing to him for the non-performance of his duty, when and to the same extent that an individual performing the same duty for reward, would be.

In Robinson vs. Chamberlain, 34 New York,389—which was an action by the owner of a canal boat against a person who had contracted with the State to repair the canal for injury to his boat while navigating the canal, through the breaking of an insufficient lock-gate, Judge Peckham, considering the liability of a public officer in damages, uses this language, page 394. "It is admitted that sheriffs and clerks, &c. are responsible to individuals for mal or non-feasance, because it is said they receive specific compensation from individuals for specific service, and hence there may be said to be a contract for its proper performance. In fact there is no more a contract in such case than if the clerk or sheriff were paid a salary, and either he received no fees or received them

from the State or county. In both cases he acts under the law, which makes it his duty to render these services, in the one case on certain prescribed terms and in the other unconditionally. Suppose a county clerk received a salary and was entitled to no fees—a party presents to him a record to file in his office and to docket a judgment. He persistently refuses to do his duty by filing it, whereby the amount of a judgment is lost: a farm on which it would have been a lien is in the meantime sold and conveyed to a bona-fide purchaser. I think there can be no doubt as to the liability of the clerk, though he received and was entitled to no fees. He has violated his duty as an officer to the party's damage. How poor a compensation to him to say that the clerk may possibly be removed or indicted!"

These cases, we think, must be regarded as settling the law that the fact that the defendants are public officers and the fact that they receive compensation from the town only, and the manner of their compensation are entirely immaterial in determining the extent of the liability of such officers in damages—that the law where it imposes damages, imposes a uniform measure upon every class of ministerial officers and upon individuals, and that in this case the fact that the defendants or their successors can still levy and collect a tax to pay these judgments ought not to be taken into account in determining the amount of damages any more than it would be if this action was against the sheriff for failing to make the amount of these judgments in execution.

The undenied allegation of the complaint is, that if the defendant had made the order, the plaintiff would have had the money upon his judgment. The last day of January, 1782, the return day of the treasurer's warrant to collect the tax in which our judgments should have been put. The damage the plaintiff suffered was not receiving his money *on that day*, it can only be compensated by *recovering the money*. It is no compensation to the

plaintiff to be turned away with the assurance that the town is good, and these defendants can yet cause the tax to be levied and collected, *if they see fit.* The Court cannot give him the money, but it can render judgment for the money he would have received on that day, and interest since, not the amount of the judgment and interest since their recovery, that would deprive the plaintiff of the interest on the accumulated interest, and if the sum were large and a long period had intervened between the recovery of the judgment, and the time when the amount should be collected, the defendants could make a profit out of their breach of the law.

We insist that this rule should be adopted by the Courts, because it will further the obedience of such officers to the laws they are elected to enforce, that it is and always should be the policy of the Courts in actions to recover damages for refusing to perform a duty required by statute,to adopt such measure of damages not inconsistent with established legal principles as will enforce compliance with the statute, such a measure as will overcome any temptation to disobey or disregard the statute, whether such temptation come in the shape of local clamor or individual prejudice or passion, and that measure we submit is only attained by damages "equivalent to specific relief."

Second. Because if these defendants can escape with nominal damages for disregarding and disobeying the law for the reason that the town is good and the tax can still be collected, every other Board of Supervisors can so escape, and inasmuch as there can be no further action nor any execution issued on these judgments, there is no other way of collecting it than through such an order, as these defendants refused to make at the request of the plaintiff, it would follow that the plaintiff must lose his debt or that its payment would depend entirely upon the whim of these defendants and their successors.

Third. Because the proof shows that the refusal of the defendants to order the tax levied was contumacious. The undenied allegations of the complaint show that the debt would have been collected and paid to the plaintiff, if the defendants had not refused to do their duty, and that they *well knew* that the judgments could not be put in the roll without this order, and with such knowledge made the roll neglecting to make the order. The only excuse suggested in the answer is the division of the town by setting off the town of Moscow in 1860, after the issue of the bond and before the suit was brought against the town. If this was any reason for not levying the tax, it was a defense so far to the action against the town: after the judgment the town was concluded. These defendants were the supervisors of the town; they were charged with the defense of the action ; They were charged with the determination as to whether the town should appeal if the defense was not allowed. The statute is imperative, that they should levy the tax if there was no appeal. They elected not to appeal! There is no suggestion of any omission through in advertance or mischance! The plaintiff's notice called their attention to the statute requiring them to act. There is no escape from the conclusion that they refused to levy the tax intentionally, contumaciously. The tax was in part to be borne by themselves, entirely by them and their constituents. It is part of the judicial history of this Court, that the County of Iowa has determined not to pay the indebtedness created under this act."

Havemeyer vs. Iowa Co., 3 Wal. 294.
Iowa Co., vs. Jerome, unreported.
Iowa Co. vs. Bowen, pending on error.

And finally, because this rule of damages is settled upon principle by authority as respectable as any in the land.

In Kortright vs. The Commercial Bank of Buffalo, 20 Wend 91, the Supreme Court of New York, and Court of

Errors, 22 Wen. 348 held, following the suggestion of Lord Mansfield, in The King vs. The Bank of England, supra, that the measure of damages for refusing to transfer stock was the value of the stock at the time of refesal, although the plaintiff owned the stock and held the certificate just as much after the refusal as he did before.

In Neff vs. Webster, 15 Wis. 283, the Supreme Court of Wisconsin held that the borrower of a safe with a combination lock, who returned the safe locked and with it the key, but concealed the combination so that the lender was unable to open the safe, liable to the lender for the full value of the safe.

In Manny vs. Dunlap, Woolworth 372, Mr. Justice Miller held an agent who had performed the direction of his principal to insure, in an unusual and doubtful manner, liable for the full amount of the insurance directed, leaving him his remedy upon his doubtful insurance. He says: "Plaintiffs had a right to insurance effected in the usual safe and secure manner. When a loss has occured, the agent cannot be heard to say, I did not do what you directed, nor as a prudent and cautious man under similar circumstances would do for himself. I departed from your instructions for my own convenience. But I have effected a valid insurance for you, and though its enforcement is uncertain, difficult and costly, and though the contract is denied by the other party, and I have no other proof than my own oath, I insist on your accepting this as a discharge of my duty, and looking to the insurance company instead of me, for indemnity." The plaintiff cannot be thrown upon this uncertain and expensive resource. He had a right to a written contract—and if he has failed to obtain this through the negligence of defendant, the latter must make good the loss. If he has any such valid contract as he alleges, let him pay the plaintiff, and he will be entitled to an assignment of it, or to sue on it in plaintiff's name for his own benefit. The result of

such a suit will be, as it ought to be, at the risk of the defendant."

We think the reasoning eminently applicable to the case at bar, we had a right to have this order made, which if made, would have brought us our money promptly and efficiently, the law of the State had cast that duty upon the defendants, they were not authorized to disobey the law through the prompting of the populace, their own malevolence or even superior wisdom. We have failed to obtain our money through the disobedience of the defendants, and they should make good the loss. If the town is good and they can still make the order and collect the tax, let them pay the plaintiff and prosecute this remedy for their own benefit, the result of such prosecution will be as it ought to be at their risk.

The Supreme Court of New York, in the case of Clark vs. Miller, 47 Barb, 38, in an action against a supervisor for neglecting to lay before the board, the amount of his judgment so that it might be put in the tax roll, and collected, the case at bar, substantially, held the supervisor liable and that the measure of damages was the entire debt and interest. This was affirmed on appeal, 54 N. Y. 528. This is the only reported case exactly like the case at bar we have been able to find. We have found no case against the rule we contend for.

Why should not this rule obtain? If one board can escape with nominal damages all boards can. It has over and again been decided by this Court that "specific relief" by mandamus, to levy the whole judgment and interest should be awarded by the Circuit Court in the original suit. Why should not relief be allowed to the same extent in this action, agreeably to the opinion of Lord Mansfield, in the King vs. The Bank of England, supra, and the decision of the Court of Errors, in Kortright vs. the Commercial Bank,

supra? The exact offence of these defendants on the pleadings is, that they being required by law to provide specific relief to the plaintiff, which would have brought his money, refused to perform their duty! Why should he not recover against them damages equivalent to the specific relief they withheld?

It is part of the history of this Court that the remedy by mandamus has come to be an exceedingly uncertain one. That the mandates of the Courts to this class of officers have been habitually disregarded, what was once the most rigorous proceeding in the law has come to be practicably ineffectual. Why should a rule of damages be adopted which enables contumacious supervisors to set the statute of the State at defiance, and which will in almost all instances result in the towns making a profit, in many cases a large one, by reason of the officers disobedience? What good is to come of it. These men knew the law. The very act was called to their attention by the plaintiff's notice. He was required to give the notice by the statute if he wanted his judgment collected, and if he did the law provided it should be levied. Since the earliest history of the Common Law it has industriously contrived remedies for breaches of contracts and duties, and that such remedies should be compensatory. The only complete compensation to the plaintiff for this breach of duty of the fendants will be to give him judgment against the defendants for such sum as he would have received if the defendants had performed their duty, with interest on the amount of the payments from the date he should have received it.

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